Case No. 11962

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PROCTER & GAMBLE MANUFACTURING CO.,

Appellant,

vs.

H. F. METCALF, *et al.,*

Appellees.

APPELLANT'S OPENING BRIEF.

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I.

JURISDICTION.

A. Jurisdiction of the District Court and of Referee Hugh L. Dickson.

The jurisdiction of the District Court of the United States for the Southern District of California, Central Division, is predicated upon 11 U. S. C. A. 1(10) and 11 U. S. C. A. 11, and upon the following pleadings and facts, and the jurisdiction of Hugh L. Dickson, Referee in Bankruptcy in and for the County of Los Angeles, State of California, is predicated upon 11 U. S. C. A. 66 and the following pleadings and facts:

(1) On March 19, 1935, and for the longer portion of the preceding six months, F. P. Newport Corporation,

Ltd., had its principal place of business at 106 West Sixth Street in the City of Los Angeles, County of Los Angeles, State of California, within the territorial jurisdiction of the District Court of the United States, Southern District of California, Central Division.

(2) On March 19, 1935, a Creditor's Involuntary Petition in Bankruptcy [Tr. p. 2] was filed in said District Court, wherein it was alleged, together with the jurisdictional facts, that said F. P. Newport Corporation, Ltd., was insolvent and had committed an act of bankruptcy.

(3) On January 12, 1937, said District Court made and entered an Adjudication of Bankruptcy of said F. P. Newport Corporation, Ltd., and made and entered its order of reference of said matter to E. R. Utley, Esq., one of the Referees in Bankruptcy of said District Court. [Tr. p. 5.]

(4) On February 28, 1945, said District Court made and entered an order of re-reference of said matter to Hugh L. Dickson, Esq., a duly qualified Referee in Bankruptcy in and for the County of Los Angeles, State of California. [Tr. p. 6.]

(5) On October 27, 1947, a Petition for Authority to Sell and for Confirmation of Sale of Real Property was filed with Referee Hugh L. Dickson in said matter. [Tr. p. 7.] He made his order thereon on December 19, 1947 [Tr. p. 26], and a petition to review said order was filed with the aforesaid District Court on December 29, 1947 [Tr. p. 36]. On May 10, 1948, said District

Court made its order vacating and setting aside said Referee's order [Tr. p. 91] and on May 25, 1948, appellant filed its Notice of Appeal herein [Tr. p. 95].

B. Jurisdiction of the Circuit Court of Appeals.

The jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is predicated on 11 U. S. C. A. 47(a) and (b) and 11 U. S. C. A. 48(a), the fact that said matter involves more than $500 and the foregoing pleadings and facts.

II.

STATEMENT OF THE CASE.

This is an appeal from an order of a District Court reversing, vacating and setting aside an order of a Referee in Bankruptcy confirming a sale of real property belonging to a bankrupt estate. The sole appellant is the bidder on the sale.

The case came before the Referee in Bankruptcy on a petition for authority to sell and for confirmation of sale of real property [Tr. p. 7] and objections thereto [Tr. pp. 12 and 21]. Hearings were had over a period of several days and the Referee then made his Findings of Fact, Conclusions of Law and Order confirming said sale. [Tr. p. 26.] A petition for review was filed [Tr. p. 36] and came on for hearing before Judge Cavanah sitting temporarily in Los Angeles [Tr. p. 312]. Some additional evidence was taken and the matter was then continued for six and one-half weeks to give the Trustee time

to seek a better bid. The matter then came on again for hearing and still further evidence was taken. At both hearings in the District Court, the Trustee, H. F. Metcalf, was the only witness. [Tr. p. 292.] The District Court then made its order reversing, vacating and setting aside the order of the Referee. [Tr. p. 91.]

III.

SPECIFICATION OF ERRORS.

Appellants rely on the following specifications of error. [Tr. p. 423.]

(1) That the District Court erred in rendering or entering the order or orders appealed from.

(2) The order or orders appealed from are not supported by adequate, or any, findings. [Tr. p. 91.]

(3) In so far as findings were made by the reviewing court, such findings are not supported by and are contrary to the evidence and are clearly erroneous. [Tr. p. 91.]

(4) The reviewing court disregarded the rule that the findings of a Referee in Bankruptcy are presumptively correct.

(5) It was an abuse of discretion for the reviewing court to deny a continuance on March 11, 1948. [Tr. p. 292 *et seq.*]

IV.

SUMMARY OF ARGUMENT.

The argument of appellant is that the showing made before the Referee in Bankruptcy justified his order of confirmation and that the order of the District Court reversing, vacating and setting aside the order of confirmation was clearly erroneous.

There was a conflict in the evidence presented to the Referee as to the fair value of the property. After hearing the evidence, the Referee accepted the evidence presented in support of confirmation. On the review before the District Court there was not even a suggestion of fraud, mistake or accident or even of gross inadequacy of price. The District Court merely felt that there might be some inadequacy of price and that a better deal might be worked out, and upon that ground and upon the ground of expediency, the District Court reversed, vacated and set aside the order of the Referee.

It is the position of appellant that to justify the vacating and setting aside of an order of confirmation there must be a showing of fraud, mistake or accident such as would avoid a sale between private parties, or a showing of such gross inadequacy of price as to shock the conscience of the court and to raise a presumption of fraud. In order to demonstrate that nothing of this sort was even suggested in the present case, it becomes necessary to examine the facts at some length. After examining the facts, we will turn to an examination of the law applicable to the factual situation.

V.

ARGUMENT.

A. The Facts.

1. The Bankruptcy Proceeding.

In 1935, the Security-First National Bank of Los Angeles held the legal title to the property here involved, as well as other properties, under a trust declaration securing a loan to the F. P. Newport Corporation, Ltd. The F. P. Newport Corporation, Ltd., was in default on the loan, and the Security-First National Bank instituted proceedings to foreclose the security held by it under the trust declaration. A creditor's involuntary petition in bankruptcy was filed on March 19, 1935 [Tr. p. 2], and as a result the Security-First National Bank was enjoined from prosecuting its foreclosure proceeding.

On January 12, 1935, an adjudication of bankruptcy of the F. P. Newport Corporation, Ltd., was made. [Tr. p. 5.] At that time, the bankrupt was indebted to the Security-First National Bank in an amount in excess of $1,000,000. Concurrently with the adjudication of bankruptcy, a written agreement was entered into between the bankrupt, its receiver, and the Security-First National Bank, whereby the Security-First National Bank waived $81,278.26 of the bankrupt's obligation and reduced the interest rate on the obligation from 6 per cent to 4 per cent. The bankrupt and its receiver agreed that the assets of the bankrupt would be liquidated and that the obligation to the Security-First National Bank would be paid in full by March 1, 1940, or that the bankrupt and the receiver would not seek to further enjoin or delay foreclosure.

Despite this agreement, the Security-First National Bank has been held off for more than twelve years in its efforts to secure payment of its secured claim either by foreclosure of its trust declaration or by liquidation of the assets of the bankrupt covered by the trust declaration. Its claim has been substantially reduced, largely by reason of the discovery of oil on real property belonging to the bankrupt estate (including the property here in question), but still exceeds $300,000. [Tr. p. 287.] The net proceeds from the present sale, if consummated, would be applied to the balance due on that claim.

The protection of creditors is of primary importance to this court as it was to the Referee. On the question of the position of the Security-First National Bank, the testimony of R. T. Adams, an assistant vice-president of the bank, is significant. He testified that while he did not at the time of the hearing consider the loan of the bank to be in jeopardy, still:

> "If we are asked to continue to speculate for the benefit of the unsecured creditors to a point definitely, the present boom will pass us by and what you can do with unproductive real estate is anybody's guess. . . . If we can liquidate today without doubt we can get our money and the unsecured creditors perhaps get something. But that can change any minute." [Tr. p. 289.]

It will, perhaps, be apparent from this history of the bankruptcy proceeding that the Security-First National Bank refrained from joining in this appeal not from a lack of interest therein but from a desire to keep itself free to press for foreclosure of its encumbrance upon the property of the bankrupt estate.

2. The Proposed Sale.

a. The Background of the Proposed Sale.

Attempts have been made over a period of several years to sell the property here in question. It was extensively advertised in 1946 at a cost of approximately $1,000 [Tr. pp. 119, 121 and 122] and folders describing the property were sent to 500 brokers in Long Beach [Tr. p. 121]. The best unrevoked and firm offer which has ever been received for the property is the offer here in question. [See Tr. p. 315.]

b. The Terms and Conditions of the Proposed Sale.

The offer in question [Tr. p. 7] is an offer of $198,000 for a 5.9906 acre tract of land situated on Channel No. 3 in Long Beach Harbor, subject to an oil and gas lease to Universal Consolidated Oil Company and reserving to the bankrupt estate all rents, royalties and other proceeds accruing under said oil and gas lease. [Tr. p. 8.] Under the terms of the oil and gas lease the lessee has prior rights to the use of all the surface except the front 150 feet, most of which is under water, and a right of way for ingress and egress to this front 150 feet. Upon the expiration, surrender or other termination of the oil and gas lease, which by its terms may run to 1963, the entire property is to vest in the purchaser. As a condition of the sale, it is provided that the Trustee shall remove certain obstructions from about 1½ acres of the land being sold to a three-acre tract located nearby and also owned by the bankrupt estate. It is estimated by the Trustee that this removal would entail a maximum cost to the bankrupt estate of $20,378 [Tr. p. 116] and would still leave the land being sold cluttered with oil wells and derricks, except

for the 1½ acres which appellant hopes to use for a baseball park and parking area for its employees in conjunction with its factory which is situated nearby, subject, of course, to the prior right of usage by the Universal Consolidated Oil Company until the expiration of its lease.

3. The Case Before the Referee in Bankruptcy—The Objections to the Sale and the Evidence Adduced Thereon.

A summary of the evidence adduced before the Referee on the hearing on the petition of the Trustee for confirmation [Tr. p. 7] and the objections thereto [Tr. pp. 12 and 21] is contained in the Referee's Certificate on Review [Tr. p. 49, at p. 53 *et seq.*]. It is not only an excellent summary but is a critical analysis of the testimony as well. Since it was prepared from memory by the Referee [Tr. p. 53] it clearly shows the attention given by him to the evidence as it was produced.

A number of separate objections to the sale were specified by the objectors, but most of them, whether purporting to do so or not, related to the question of the adequacy of the price. The most important of these objections will be considered seriatim.

a. The Objection That the Price Offered Was Inadequate.

On the question of the adequacy of the price, the first point to be noted is that the property was appraised in December 1945 at $211,462 by Thomas J. Cunningham, an appraiser appointed by the court, and now a judge of the Superior Court of Los Angeles County.

The second point to be noted is the inability of the Trustee to obtain a higher bid during the several-year

period in which he has been pressing for the sale of this property. The Referee succinctly put it in the course of the hearing that "anything in the world you have to sell is worth what you can get for it" [Tr. p. 275] and this observation seems particularly applicable to the present controversy over the adequacy of the price.

Harry C. Higgins, H. V. Johnson, Clark C. Burgess, and H. G. Newport testified, on behalf of the objectors, to appraisals of the property at from $359,435, or $60,000 per acre to $419,571 (approximately $70,000 per acre). None of these individuals knew of any sale of comparable property at anything like the price per acre they placed upon the property, and all admitted that sales which have been made have been at approximately the proposed sale price per acre (approximately $33,000).

Mr. Higgins testified to a sale by Southern Pacific Company, by whom he is employed, of a similar property at $26,500 per acre. [Tr. p. 108.] He also admitted that in making his appraisal he had not taken into consideration the fact that the surface use of the property desired to be purchased by appellant was limited by reason of the surface being covered with derricks and oil equipment, which could continue until 1963, and admitted that he had assumed in making his appraisal that the surface could be used without interruption. [Tr. p. 109.]

Mr. Johnson admitted that he had never appraised any waterfront property in Los Angeles, Long Beach, or San Pedro harbor [Tr. pp. 134 and 152]; that he had never examined the oil and gas lease on this property and did

not know the limitations imposed upon the use of the surface of the property by that lease [Tr. p. 141]; that his first appraisal of this property was on behalf of Mr. Newport and in aid of an attempt to obtain a loan on the property [Tr. p. 152, and see Tr. p. 155]; and that several of the properties which have been sold in the area have concrete seawalls whereas the property in question does not have any seawall and is badly erroded, having the front 1.63 acres under water [Tr. p. 144] and that he had not computed the cost of a seawall or bulkhead [Tr. p. 145]. He testified he was familiar with the Mason Report, Trustee's Exhibit 7, and did not question any of the prices per acre of sales shown in that report. [Tr. p. 151.]

Mr. Burgess admitted that he was not aware that this property had been previously offered for sale [Tr. p. 241] and that he based his appraisal entirely upon familiarity with leases which had been made in the area rather than upon sales [Tr. p. 241]. He testified he knew of no recent sales on Channel 3 or Channel 2 [Tr. p. 241] and was unfamiliar with the specific sales which had been made in that area as to which inquiry was made [Tr. pp. 242-243].

Mr. Newport [Tr. pp. 278-286] was clearly a prejudiced witness since he admittedly wishes to retain the present property to aid in a refinancing or reorganization scheme which he has tried to promote since the beginning of this bankruptcy more than 13 years ago and which he hopes may become possible of consummation in the future.

Thomas F. Mason testified on behalf of the Security-First National Bank that he had been a realtor-appraiser since June 1923, and had had a wide experience in the appraisal of real property, including a wide experience in the appraisal of waterfront property throughout Southern California and in Los Angeles Harbor. [Tr. p. 178.] He testified that in his opinion the fair market value of the property in question was $184,000 in December 1945 [Tr. p. 190] and $196,350 as of the date of trial [Tr. p. 180] and gave his reasons for that appraisal at length [Tr. pp. 180-182]. He testified that to put the property into usable condition as waterfront property, it would be necessary to construct a bulkhead and make a fill behind it that would cost for "a minimum bulkhead" $52,500 [Tr. p. 184] and for the fill $30,000 [Tr. p. 185], making a total of $82,-500. [Tr. p. 185.] He testified that only about one-half of the vessels coming into Los Angeles Harbor could dock at a 500 foot dock such as could be built on this property. [Tr. p. 187.] He testified that there had been only one sale of waterfront property in this area within recent years and that one large waterfront property had been on the market for approximately ten years. [Tr. p. 188.]

One cannot read the testimony of Mr. Mason without being impressed with his qualifications, his knowledge of the waterfront area involved and the thoroughness of his appraisal. It is not surprising that the Referee who heard his testimony accepted Mr. Mason's appraisal [Tr. p. 360] since he was clearly the best informed of the experts who testified Indeed, it would have been surprising if the Referee had not accepted it.

b. The Objection That the Value of the Oil and Gas Royalty Retained by the Bankrupt Estate Will Be Depreciated by Being Separated From the Reversion.

It is not disputed by appelant that the attractiveness to a purchaser of the royalty without the reversion is less than the attractiveness of the royalty and reversion combined. The testimony on this point consisted of nothing more than statements to this effect. [Testimony of Roy G. Mead, Tr. p. 170, and letter of Albert A. Carrey, Tr. p. 192 *et seq.*, as to which it was stipulated that Albert A. Carrey would have so testified.]

It is, of course, obvious that Procter & Gamble Manufacturing Co. expects to receive something in return for its $198,000 in addition to the right to use 1½ acres for a baseball park and parking area for its employees, subject, of course, to the prior right of usage by the Universal Consolidated Oil Company, and the right to use the front 150 feet, most of which is under water. Procter and Gamble must have assurance that not later than 1963 (the termination of the present lease) it can use the entire surface, and to protect itself in this connection it must own the reversionary interest under this lease; if it did not, the owner of the reversionary interest would have the right of access to the property, and the right to attempt to produce oil or gas therefrom so as to prevent full use of the surface of the property by appellant. It is manifest that this reversionary interest has some value. While it is difficult to determine the exact amount of value attributable to it, it is clear that the reversion is one of the elements going to make up the total value.

c. The Objection That There May Be Additional Oil Zones Under This Property and That These Additional Oil Zones Will Be Lost to the Bankrupt Estate Unless They Are Developed by the Present Lessee.

There is no dispute as to there being three oil horizons in this general area which are known as the "Ranger Zone," the "Ford Zone," and the "237 Zone." The Ranger Zone is the only zone which has been produced on this property. The point made by the objectors is that at some time in the future it may become possible to produce from the Ford Zone or the 237 Zone, and that unless such production occurs under the existing lease and prior to 1963, it will not redound to the benefit of the bankrupt estate.

It is not disputed but that the Ranger Zone will in all probability be exhausted by the present lessee prior to the expiration of its lease in 1963. And, of course, in addition to the production from the Ranger Zone, any production from the Ford Zone or the 237 Zone during the term of the existing lease will redound to the benefit of the bankrupt estate.

Roy G. Mead [Tr. pp. 201-219; 264-268] and Albert A. Carrey [Tr. pp. 247-263] both testified to the possibility of production on this property from the Ford Zone and the 237 Zone.

Mr. Mead based his testimony *entirely* on the electric log from Well No. 6 on this property which was deepened to 100 to 150 feet below the ~~case~~ base of the Ford Zone [Tr. p. 224] but was never brought into production. He had no information as to the cores taken in deepening that well—had never examined them and had never examined the

production log or made inquiry as to the results shown by it. [Tr. p. 214.] After hearing the testimony of G. F. Follansbee, Jr., as to these matters, he was still of the opinion that "there is a possibility of some production" from the Ford Zone and the 237 Zone. [Tr. pp. 264-265.]

Mr. Carrey testified that in his opinion "there was and still is some possibility of production" from the Ford Zone [Tr. p. 255] and "that there might be a chance. There is a fair chance of production," from the 237 Zone [Tr. p. 257]. He also testified that Well No. 6 drilled by Universal Consolidated Oil Company was not conclusive of the absence of oil in these zones. He admitted, however, that he had not and would not, on the basis of presently known facts, recommend a forfeiture of the lease for failure to explore these zones [Tr. p. 259] and that he was "not in a position to say" whether a lessee could be found who would drill a well at the present time. [Tr. p. 260.]

G. F. Follansbee, Jr., Vice President of Universal Consolidated Oil Company, the present lessee, testified to the deepening of Well No. 6 on the property in question to a depth of 5,918 feet at which point it was estimated that the well was 100 to 150 feet below the base of the Ford Zone. [Tr. p. 224.] He testified that in deepening the well numerous cores were taken [Tr. p. 224] and that while there was some indication of oil it was his opinion, based on the electric log, the production log and the cores, that the well would not be commercially productive in the Ford Zone [Tr. p. 224]. Universal Consolidated Oil Company acted upon this opinion and plugged the well.

We have here two experts testifying from very limited knowledge to a "possibility" of production from the Ford

Zone and from the 237 Zone. On the other hand, we have the testimony of the expert in charge of the drilling of a well to below the base of the Ford Zone. That the Universal Consolidated Oil Company is considered to be a good operator and to have a good engineering staff was admitted by Mr. Mead [Tr. p. 214] and the action of that company in abandoning Well No. 6 speaks louder than the voice of experts having very limited knowledge of the facts, and whose money was not being invested in the well.

d. THE OBJECTION THAT THE PROPOSED SALE WOULD NET LESS THAN $198,000 AND THAT THE NET WOULD BE OF LESS VALUE THAN THE LAND TO THE BANKRUPT ESTATE.

It is not disputed by appellant that the sale will net less than $198,000 to the bankrupt estate. The bid price was $198,000, but as a condition it was required that certain surface obstructions be removed from 1½ acres of the premises, the removal of which it is estimated will cost a maximum of $20,378 [Tr. p. 116] and there is the possibility of a deduction for a real estate commission.

While we recognize Joseph Sattler as a "finder" and think that the Referee had discretion to order the payment of a commission to him [Tr. p. 34] it is not a matter with which we are primarily concerned. Of course, if Judge Cavanah had thought or this court thinks that the commission cannot properly be paid it is a matter for modification and not reversal.

As to the possible necessity for the payment of income tax in connection with this sale, that clearly is not a proper element for consideration on the question of value, and it cannot be seriously argued that this bankrupt estate should not be liquidated because to liquidate it would necessitate

the payment of taxes. Every seller has the factor of taxes on any gain resulting from a sale, but this has no bearing on the fair market value of his property.

e. THE OBJECTION THAT THE SALE WOULD INTERFERE WITH REHABILITATION, REFINANCING AND REORGANIZATION.

The objection that the sale would interfere with rehabilitation, refinancing and reorganization is also based upon the theory of inadequacy of price and requires no additional discussion. However, the frequency with which it has been urged in this bankruptcy proceeding that refinancing programs are about to be consummated is worthy of note. On cross-examination, Mr. Newport admitted that he had asserted that a refinancing program was about to be consummated in 1935, in opposition to the efforts of the Security-First National Bank to foreclose its declaration of trust; that he had made the same assertion again in 1942, in opposition to a proposed sale of certain property; and that he had made the same assertion again in 1944, when the Security-First National Bank again sought to foreclose its declaration of trust. [Tr. p. 285.] In spite of these frequent assertions, a refinancing program has never been consummated, and there appears to be nothing more than a nebulous possibility of the consummation of such a program in the near future.

f. THE FINDINGS AND ORDER OF THE REFEREE.

The Referee, after hearing the testimony, made his written Findings of Fact, Conclusions of Law and Order [Tr. p. 26] wherein he found in accordance with the petition and wherein he found that the objections to the sale were without merit [Tr. p. 29]. He made his order that the sale "be and it is hereby confirmed." [Tr. p. 32.]

4. The Case Before the District Court on Review.

The objectors to confirmation filed a petition for a review on December 29, 1947 [Tr. p. 36], and the matter came on for hearing on March 11, 1948 [Tr. p. 312], before the Honorable Charles C. Cavanah, sitting temporarily in Los Angeles. It was represented to the court by the petitioners for review that an unusual situation had developed and that new facts had been discovered, and, on the basis of that representation, the court consented to the hearing of new evidence. [Tr. pp. 313-317.] This was presented by H. F. Metcalf, Trustee for the bankrupt, who had also testified before the Referee, and who was the only witness to appear before the District Court.

H. F. Metcalf was called as a witness by the petitioning objectors and testified that since the confirmation by the Referee a demand had developed for oil royalties where there previously had been very little demand [Tr. p. 321] and that he had "made the discovery" that prospective purchasers of oil royalties wanted the royalties not only under the existing lease but also a royalty on any production that might accrue after the termination of the lease [Tr. p. 325], and that, although he had previously recommended the sale, he did not now consider the sale to be for the best interests of the estate. He was afraid that the present sale might interfere with a subsequent sale of the royalties but had no reliable information on the point. Concerning it he said [Tr. p. 331]:

> "A. Well, I have been told that that will be a serious detriment. Now, how much it would reflect itself in price, Mr. Cahill, or whether it would destroy the deal or not, definitely I don't know that."

With respect to possible purchasers of both surface and oil rights under the six acre parcel now in issue, as well as a nearby three acre parcel owned by the bankrupt estate, Mr. Metcalf testified [Tr. pp. 329-330]:

> "A. Well, I haven't definite offers, Mr. Cahill. If I had one, I would talk entirely differently. I haven't definite offers. I have had casual offers, your Honor. I have had men who say we can get $600,000. 'Do you want to look at it?' And I said, 'No, I can't wiggle out at $600,000.' 'Will you pay $750,000?' They said, 'We think we can get it—we think so.'
>
> The Court: How much time do they want to think it over?
>
> The Witness: God knows, your Honor."

On cross-examination, Mr. Metcalf testified that at the time the sale was confirmed by the Referee it was his opinion that it was an advantageous sale.

At the conclusion of the new evidence introduced at the proceeding on review and at the conclusion of argument thereon, the court continued the matter for six and one-half weeks in order to give the Trustee an opportunity to secure further bids. [Tr. pp. 418-421.]

When the matter came on again for hearing [Tr. p. 292], a continuance was requested by counsel for the petitioning objectors in order to explore the possibility of another sale at a better price, and all parties (including counsel for appellant) acquiesced in the request. Judge Cavanah announced that he was leaving the following night and that he could give no continuance [Tr. p. 292]; that the Trustee had indicated that he could get another bid by that time and that he wanted to rule on the matter [Tr. p. 293].

The court was advised that the Trustee had been unable to obtain any better bid [Tr. p. 293] but that negotiations were in progress. Mr. H. F. Metcalf, the Trustee, was again called and testified to general efforts to secure better offers. [Tr. p. 300 *et seq.*] In response to a question by the court as to whether he really felt the bid of $198,000 was inadequate, he replied [Tr. p. 306]:

> "No, I don't. I think, if that bid were properly safeguarded—and these gentlemen have shown pretty active feeling in that regard—I think if the oil—and I don't see why, if Procter & Gamble mean what they say—and I feel sure they do—that some proposition couldn't be worked out with them to protect the extra oil rights, whatever they might be, in the future. I don't know. I can't look 15 years ahead."

The court commented twice on the inadequacy of the bid [Tr. pp. 308 and 311] but there was not the slightest suggestion of any gross inadequacy and it seems probable that the court's thought that there might be some inadequacy was based on the increased value of oil and of oil royalties, although the oil royalties are, *in fact,* being retained by the bankrupt estate. The Trustee said that the price of oil was going up and the court commented [Tr. p. 306]:

> "The Court: It is going up?
>
> "The Witness: It is likely to go up again.
>
> "The Court: Why slough it off under a bid like this?"

The court several times commented on the uncertainty of the situation as to getting better bids, saying at one point [Tr. p. 299]:

> "He has not the bid. He is in hopes of getting one, if we keep putting it off."

And at another point [Tr. p. 307]:

> "There is a chance, as the trustee says here, if further time is given, maybe they can get more, but they do not know. It is like everything else."

And at still another point [Tr. p. 309]:

> "I would not be justified in continuing here, trying to administer the sales of certain parts of this estate, in hopes we might get another bid if certain things happen. The 'if' is always in the way."

The court several times spoke as though the question before it were a question of confirmation of the sale and not one of the review of an order of confirmation.

> "I think the only thing I can do, under this showing here, is to decline to confirm this bid, under the order of the sale of the Referee, and reverse it.
>
> "You can go down there and do your business. You will not be here in the Court on any of it. If certain things happen, go down there and see if you can do some business; try it. That is the law." [Tr. p. 308.]
>
> "On this showing before me I would not be justified in confirming this sale at all." [Tr. p. 309.]
>
> "I am satisfied, in the interest of all concerned, I should not confirm this order of sale of the Referee for $198,000.00.
>
> "I have given you all a chance to see if you could do better, and we find you cannot. We are just where we were. I have to pass on it.
>
> "The order will be, the sale of the Referee is not confirmed. It is reversed."
>
> "Gentlemen, you will have to go there to transact your future business." [Tr. p. 309.]

B. The Law.

In the instant case the Trustee did not make a sale of the property. Instead, appellant made an offer to purchase the property which was submitted to the Referee by the Trustee with the recommendation that he approve and confirm the sale. The Referee's order was an actual confirmation of the sale and did not provide for the approval of the District Court, such approval not being necessary since the sale was for more than seventy-five per centum of the appraised value. (11 U. S. C. A. Sec. 110(f).) Upon the order of confirmation being made, equitable title to the property immediately vested in appellant. (6 Remington on Bankruptcy, 4th Ed. 1937, p. 60, Sec. 2569.) The order of the District Court reversed, vacated and set aside the order of confirmation and divested appellant of its equitable title in the property.

One cannot read the record of the final hearing before the District Court [Tr. pp. 292-311] without becoming convinced that Judge Cavanah treated the case before him as though it were a question of confirmation rather than a question of *review* of an order of confirmation. It was not even suggested that there was any fraud, accident or mistake such as would justify the avoidance of a sale between private parties. Judge Cavanah clearly based his act upon a belief that there might be some inadequacy of the price and upon the matter of expediency, namely, the fact that he would not be available for future hearings and thought there was some possibility of a deal being worked out which would be more advantageous to the bankrupt estate. We submit that an examination of the authorities shows clearly that this was an insufficient basis for the reversal of an order of confirmation and that there was an abuse of discretion in making the order of reversal upon that basis.

1. A Confirmed Sale Can Be Vacated and Set Aside Only on a Showing of Fraud, Accident or Mistake Sufficient to Avoid a Sale Between Private Parties, or Such Gross Inadequacy of Price as to Raise a Presumption of Fraud.

In 6 Remington on Bankruptcy (4th Edition 1937), page 60, it is said:

> "§2569. Vacating Confirmation.—After a sale has been confirmed, it can be vacated for cause, but slight cause will not suffice.
>
> "The confirmation of the sale does not vest the legal title in the purchaser, but does vest in him the full equitable title. Before confirmation the trustee's sale is not a sale in a technical or legal sense, for, until confirmation, an accepted bidder is merely a preferred proposer or offerer; after confirmation, however, the case is different, and the confirmation cannot be vacated merely for inadequacy of price, but only for fraud, accident, mistake or some other cause for which equity would avoid a like sale between private parties."

In *In re Realty Foundation, Inc.*, 75 F. 2d 286 (C. C. A. 2, 1935), the Referee in Bankruptcy had confirmed a bid of Foundation Properties, Inc., for certain assets in bulk of the bankrupt for a total of $44,000. The unsuccessful bidder filed a petition to reverse the order of the Referee, and the District Court reversed the Referee and ordered a resale of the property. Foundation Properties, Inc., the successful bidder whose offer was confirmed by the Referee, appealed to the Circuit Court of Appeals. The decision of the District Court was reversed on the ground that the unsuccessful bidder at the hearing before the Referee had no standing to petition the District Court to

reverse the Referee's order, and the court said, at page 288:

> "Appellee further seeks to sustain the court below on the novel theory that the latter had disposed of the appeal in accordance with a sound discretion. The difficulty with this is that, *in confirming the sale, the referee acted as a judge of the bankruptcy court with power to hear and determine the matter before him, and the District Judge had no power whatever to make orders in the general interest of the creditors, but stood only in the position of an appellate judge who might review the decision of the referee upon a petition taken by some one having a legal interest in the premises.*"*

In *In re Burr Mfg. & Supply Co.,* 217 Fed. 16 (C. C. A. 2, 1914), the court confirmed a sale of certain property of the bankrupt for $6,250 to one Porter. A motion to vacate the confirmation to Porter was granted and another sale held, at which time $8,500 was bid for the property and the sale confirmed. Porter appealed, and in reversing the order vacating the first sale to Porter, the court said at page 21:

> "The rule is that inadequacy of price, standing alone, is not sufficient ground for setting aside a sale, unless the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the court. The difference between $6,250, for which the property was first sold, and $7,500, for which the court was willing to sell on the resale, and the difference between the amount of the first sale and the

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*Emphasis added unless otherwise indicated.

amount of $8,500 realized at the resale, does not show that gross inadequacy which warrants a resale. The cases which illustrate what is meant by inadequacy which shocks the conscience are cases where the difference in value was very much greater than the difference existing in this case. In *Lankford v. Jackson,* 21 Ala. 650, property worth $1,000 was sold for $6. In *Daly v. Ely,* 51 N. J. Eq. 104, 26 Atl. 263, property worth $2,500 was sold for $50. In *Hardin v. Smith,* 49 Tex. 420, property worth from $2 to $5 an acre was sold for 28 cents per acre. And perhaps a sale for a half or a third of actual value may be within the rule. *Sinnett v. Cralle,* 4 W. Va. 600. But such a difference in value as is shown in the case at bar cannot be regarded as coming within the rule, even when taken in connection with the circumstances already noted. The circumstances relied upon raise no presumption of fraud or unfairness.

"Before confirmation, if the inadequacy of the price be great, slight circumstances of unfairness on the part of the party benefited will be sufficient to prevent confirmation, and will justify the opening of the sale for further bids. In *Ballentyne v. Smith,* 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803 (1905), this course was allowed, the property being worth at least seven times more than the sum bid. But the case is different after the sale has been confirmed, and the court below seems to have lost sight of this distinction. After a sale has been confirmed, the court and the successful bidder are regarded as occupying the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties. In *Morrison v. Burnette,* 154 F. 617, 624 (83 C. C. A. 391, 398 (1907)) the

Circuit Court of Appeals in the Eighth Circuit declared that:

" 'The rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale, or in opening the latter and receiving subsequent bids.'

"The court considered the rule so firmly established as to be no longer debatable, and in that view of the matter we concur. The cases are there collected, and need not be repeated here. And in view of the established principles there can be no doubt that the court below has committed a serious error in vacating the order confirming the sale made to the petitioner."

In *Allen v. Union Transfer Co.,* 152 F. 2d 633 (C. C. A. 10, 1945) cert. den. 327 U. S. 807 (1935), a sale of the bankrupt's property for $4,250 was confirmed by the Referee, but thereafter a bid for $6,250 was received. Thereupon the Referee, on motion, set aside the first sale and ordered a second sale to be held, at which time a bid of $9,050 was received for the property and the property sold at this price. On appeal, the District Court reversed the action of the Referee in setting aside his confirmation and ordered the affirmation of the first sale. On appeal, the action of the District Court was affirmed, the court saying at page 635:

"While a judicial sale will not be set aside on the ground of inadequacy of price alone, unless the inadequacy is so great as to shock the conscience of

the chancellor, inadequacy of price, accompanied with other circumstances having a tendency to cause such inadequacy, or indicating any apparent unfairness or impropriety, will justify setting aside the sale. Such additional circumstances may be slight and insufficient in themselves to justify vacating the sale. 'The integrity of judicial sales is as important as their stability.'

"Here, there was inadequacy of price and the confirmation took place immediately after the sale and no opportunity was afforded the two creditors who did not have notice to object. But there were no facts presented showing any unfairness or impropriety in the sale to Union or raising any doubt as to the integrity of the sale . . .

"There being no circumstances throwing doubt on the integrity of the sale to Union, and the inadequacy of the consideration not being such as to shock the conscience of the chancellor, the order confirming the sale to Union should not have been set aside by the referee."

In *Pewabic Mining Co. v. Mason,* 145 U. S. 349 (1892), the court had ordered the sale of assets of a corporation whose charter had expired, and after doing advertising, a sale was duly made by the Master in Chancery. Petitions were made to vacate this sale, but in refusing to set the sale aside the court said, at page 356:

"The question in this case is whether the master's sale shall stand. It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and conditions of such a sale, as well as to ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect

the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted. Yet, the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, *it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto.*"

There are several cases holding on their facts that the Referee may at his discretion accept and confirm a substantially higher bid prior to the confirmation of the sale, even though the first bid is not grossly inadequate. These cases constantly carry dicta to the effect that after confirmation, a sale will not be vacated except for gross inadequacy of the bid or other matters sufficient to shock the conscience of the court. See *Reid v. King,* 157 F. 2d 868 (C. C. A. 4, 1946) and *Coulter v. Blieden,* 104 F. 2d 29 (C. C. A. 8, 1939).

2. A Referee's Findings Are Binding Upon the District Court Unless Clearly Shown to Be Erroneous, and a Circuit Court of Appeals Will Reverse a District Court Where It Has Disregarded This Rule.

There are numerous cases stating in various fashions that the findings of fact of a Referee in Bankruptcy should be accepted by the Courts, not only in confirmation cases but in all cases unless it is clearly shown that such findings are erroneous and would obviously result in a miscarriage of justice.

In re D. T. Bohon Co., 22 Fed. Supp. 561 (D. C. Ky. 1937), where a petition to review and to disapprove a Referee's refusal to confirm a sale made at public auction

for substantially less than the appraised value was denied and the Referee's ruling approved. The Court said at page 563:

> "The referee had the opportunity of personal observation of and, perhaps, personal acquaintance with the witnesses. His location at the scene of the conflict enable him to view the entire picture at close range. He was in a particularly advantageous position to appraise the relative values of the various discordant opinions and to decide to which of them greater weight should be attributed.
>
> "These considerations are at the foundation of the familiar rule that the findings of fact of the referee upon conflicting testimony should be accepted by the court unless it be clearly shown that they are erroneous and would obviously result in a miscarriage of justice.
>
> "This rule was emphatically reaffirmed in a recent opinion of the Court of Appeals of this circuit in the case of Kowalsky v. American Employers Insurance Company, 6 Cir., 90 F. 2d 476, 479, decided June 2, 1937."

Baker v. Sproul, 37 F. 2d 937 (D. C. Pa. 1929), affirmed 37 F. 2d 938 (C. C. A. 3, 1930), where it was held that the findings of a referee should not be set aside except for "cogent reasons."

In *Kowalsky v. American Employers Ins. Co.,* 90 F. 2d 476 (C. C. A. 6, 1937), the referee granted the discharge of the bankrupt, but was reversed by the District Court. On appeal, the Circuit Court of Appeals reversed the District Court and affirmed the Referee's order on the ground that the District Court, in order to reverse the Referee's

order, must show "most cogent evidence of a mistake and a miscarriage of justice." The court said, at page 479:

> "It is true that the District Judge is not bound by the findings of fact of a special master. Though he should not lightly set them aside, he may, if they appear to him against the clear weight of the evidence; and, if he does, the master's findings are without controlling force in Circuit Courts of Appeals. Grossberger v. B. F. Goodrich Rubber Co., 8 F. (2d) 964 (C. C. A. 6); *In re Moran,* 299 F. 222, 224 (C. C. A. 6).

> "But the District Judge should not disturb the findings of fact of a referee in bankruptcy, *unless there is most cogent evidence of mistake and miscarriage of justice.* In *Ohio Valley Bank Co. v. Mack,* 163 F. 155, 158, 24 L. R. A. (N. S.) 184, we said: 'No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report. *Tilghman v. Proctor,* 125 U. S. 136, 137, 8 S. Ct. 894, 31 L. Ed. 664; *Davis v. Schwartz,* 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289; *Emil Kiewert Co. v. Juneau,* 78 F. 708, 24 C. C. A. 294; *Tug River Co. v. Brigel,* 86 F. 818, 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of

credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his finding unless there is most cogent *evidence of a mistake and miscarriage of justice.* Loveland on Bankruptcy, §32a; *In re Swift* (D. C.) 118 F. 348; *In re Rider* (D. C.) 96 F. 811; *In re Waxelbaum* (D. C.) 101 F. 228; *In re Stout* (D. C.) 109 F. 794; *In re Miner* (D. C.) 117 F. 953.' See to the same effect: *Rasmussen v. Gresly,* 77 F. (2d) 252 (C. C. A. 8); *In re Slocum,* 22 F. (2d) 282 (C. C. A. 2); *Walter v. Atha,* 262 F. 75, 77 (C. C. A. 3); *Baker v. Bishop-Babcock-Becker Co.,* 220 F. 657 (C. C. A. 4); *Bank of Commerce v. Matthews,* 257 F. 292 (C. C. A. 7); *Id.* (C. C. A.) 272 F. 263; *In re Croonborg,* 268 F. 352 (C. C. A. 7); *In re Wheeler,* 165 F. 188 (C. C. A. 7)."

3. Although the Trustee Changes His Mind and Does Not Recommend Confirmation the Sale May Nevertheless Be Confirmed.

It has been held that where the Trustee changes his mind and does not recommend confirmation the sale may nevertheless be approved.

In *Currin v. Nourse,* 74 F. 2d 273 (C. C. A. 8, 1934) cert. den. 294 U. S. 729 (1935), a sale of certain of the assets of a bankrupt was confirmed on February 8, 1933, by the Referee in Bankruptcy upon the recommendation of the trustee, and on March 21, 1933, this was approved by the District Court. On appeal, the case was remanded for further evidence and on September 15, 1933, the Referee again confirmed the sale, although at this time the

Trustee in Bankruptcy refused to recommend the sale. Certain unsecured creditors appealed the confirmation of the Referee to the District Court, claiming that they had a better offer for the property. The District Court ordered the Referee to hear the evidence with respect to this alleged better bid but, upon hearing the evidence on December 2d, 1933, the Referee found there was not, in fact, a better bid and again confirmed the sale, although the Trustee still did not recommend the sale. The District Court sustained the Referee, and on appeal this decision was affirmed, the court saying at page 280:

> "On the question of the real value of the properties, therefore, and what they ought to sell for, we attach importance to the sworn showing and the testimony of the trustee. When he petitioned the court for an order of sale in December of 1932, he suggested that an upset price of $300,000 be set by the court, which shows he must have believed that such price, though doubtless less than he hoped to get, was not 'grossly inadequate.' . . . Also the sworn statement of the referee, on making the sale, that he had used reasonable diligence to sell the properties and that in his opinion the sale to Stern Bros. was the best cash offer that he was able to obtain, persuade that such was his belief at the time. A point is made of the fact that when the trustee was called as a witness at the hearing on confirmation before the referee in August and September of 1933, *more than six months after he had made his sworn return, he refused to recommend confirmation of the sale.* He did not deny that he had made every reasonable effort to sell the properties at the best possible price, nor that the Stern Bros.' bid was the best that he had been able to obtain. *We think his testimony reaffirms his sworn return as to those vital matters.*

But it was his thought that the responsibility for confirmation or refusal to confirm the sale rested upon the court and not on him, and his attitude was that if a better deal for the creditors could be had, he would be for it, he wanted to hear the evidence. His testimony also reflects that he then thought that if he could be continued in control and operation of the property, he could ultimately work out more for the creditors. On this basis, he would not recommend the confirmation of the sale. *Such hopes, however, developed so long after sale, were not controlling upon the court.*

"Appraisals have been made of the properties reflecting a much greater value than that obtained on the sale. It is undoubtedly true, as stated by Judge Otis in his opinion of November 22, 1933, that 'a large majority of the general creditors appear to believe that the amount bid by Stern Brothers is inadequate and that the properties are worth much more and can be sold for much more,' but such *beliefs, however honest, as well as the opinions of expert engineers and appraisers, avail nothing against the stern fact that a better bid was not to be had.*"

4. The Public Interest Requires Stability in Judicial Sales.

Several cases emphasize the public interest involved in regard to judicial sales.

In *In re Hoffman,* 16 F. 2d 939 (D. C. Pa. 1927), real estate belonging to the bankrupt was sold at public auction for $164,983.24, being 93.4% of its appraised value. At the hearing on confirmation, the appellant appeared and objected to confirmation on the ground of inadequacy of price, and thereupon offered $171,000 for the property. The Referee ordered the appellant to file a bond for

$171,000 conditioned upon faithful compliance with his bid; appellant refused to file this bond unless his bid was accepted, and thereupon the Referee confirmed the sale for $164,983.24. Appellant then bid each parcel separately (except for one small parcel) at an increase averaging 8% and totaling $176,818, and offered to put up 10% of his bid in cash. The Referee refused his offer and confirmed the initial sale. On appellant's petition to review the Referee's order, the court affirmed this order and said, at page 940:

> "Public policy requires stability in judicial sales, to induce bidding at such sales and reliance upon them. The purpose of the law is that they should be final; they are not to be disturbed, except for substantial reasons. We think the reasonings of the learned referee are unassailable, and his conclusion correct."

In *In re Pneumatic Tube Steam Splicer Co.*, 60 F. 2d 524 (D. C. Md. 1932), the court, in refusing to vacate a sale confirmed by the Referee of the assets of a bankrupt corporation said, at page 527:

> "Nothing should be done to weaken confidence in the stability of judicial sales. There must be some real cause before they will be upset. Inadequacy of price alone is rarely sufficient—that is, there must be proven gross inadequacy, or circumstances from which palpable mistake or fraud is to be inferred. The order provided that the property should not be sold for less than 75 per cent. of its appraised value. Here the appraised value was slightly exceeded. Were the court to rescind the sale and order another, there is no assurance whatever that the property could then be disposed of at all. Certainly, under these circumstances, the court would not be justified in

depriving a *bona fide* purchaser of his rights. *Ballentyne v. Smith,* 205 U. S. 285, 27 S. Ct. 527, 51 L. Ed. 803; *Speers Sand & Clay Works v. American Trust Co.* (C. C. A.), 52 F. (2d) 831; *In re Burr Mfg. & Supply Co.* (C. C. A.), 217 F. 16. It may be assumed, without deciding, that, *were the representations made to the court not merely of a vague and speculative nature, but in the form of an actual offer to pay substantially more for the property, the situation might be different.*"

5. Even Before Confirmation It Has Been Held That a Higher Bid May Properly Be Refused.

Even before confirmation of a Trustee's sale has taken place it has been held in some cases that it is not an abuse of the court's discretion to refuse to consider a higher bid for the property.

In *Prentice v. Boteler,* 141 F. 2d 175 (C. C. A. 9, 1944), property was sold by the Trustee in Bankruptcy at a private sale, subject to confirmation of the court, for $2,250. At the hearing for confirmation before the Referee, appellant bid $2,325, or $75 more than the best bid received at the private sale. The Referee confirmed the lower bid and his action was approved by the District Court. On appeal, the court affirmed these judgments and stated at page 177:

"The practice followed in connection with judicial sales is clearly explained in *Jacobsohn v. Larkey,* 3 Cir. 245 F. 538, 541, L. R. A. 1918C, 1176: 'After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale, recognizing that nothing will more certainly tend to discourage and

prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person subsequently made, to bid higher on resale. [Citing cases.]' The reasoning developed is equally applicable to the situation involved herein, where there is an attempt to block confirmation of a trustee's sale by making a slightly higher bid before the referee, as to the resale situation discussed in the *Jacobsohn* case."

In *In re Stanley Engineering Corporation,* 164 F. 2d 316 (C. C. A. 3, 1947) cert. den. 68 Sup. Ct. 351 (1948), the bankruptcy court authorized the sale of the assets of the Stanley Engineering Corporation, a bankrupt, at public auction. The property had been appraised at $50,000, and one Galman made the high bid of $57,200. Galman then entered into a contract of sale with the Trustee in Bankruptcy and submitted a certified check for 15% of the purchase price. The Trustee thereupon petitioned the bankruptcy court to confirm the sale, and at the hearing on confirmation, a representative of the Gaby Company appeared and offered $63,250 for the property, or about 10% more than Galman's bid. At the hearing, the bankruptcy court announced that it contemplated directing a new public sale contingent upon the filing of a bond by the Gaby Company to insure the renewal of its bid at such sale. Counsel for the Trustee urged the court to avoid the delay of another public sale and to conclude the matter at that time after giving Galman the opportunity to make a further bid, and the court acceded to this suggestion. Thereupon Galman said that he would meet the bid of the Gaby Company, whereupon the Gaby Company increased its bid to $67,250. When Galman refused to

match this bid, the court thereupon accepted the bid of the Gaby Company and confirmed the sale. Galman thereupon appealed, and the Circuit Court of Appeals held that it was an abuse of discretion to refuse to confirm the initial bid of Galman in the amount of $57,200 and said, pages 318 and 319:

> "The Bankruptcy Act, as amended by Section 1, 52 Stat. 879 (1938), 11 U. S. C. A. §110, sub. f., provides as follows: '* * * Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value * * *'
>
> "While the extent of the power of the bankruptcy court, in denying a confirmation or setting aside judicial sales, is not spelled out in the statute, the extent of such power has been spelled out in numerous decisions.
>
> "These decisions establish:
>
> "That judicial sales, made upon due notice and in accordance with law, will be confirmed unless (a) there was fraud, unfairness or mistake in the conduct of the sale; or (b) the price brought at the sale was so grossly inadequate as to shock the conscience of the court and raise a presumption of fraud, unfairness or mistake. Mere inadequacy of price is not a sufficient ground for setting aside a judicial sale where there was no unfairness in the conduct of the sale. In determining whether gross inadequacy exists the bankruptcy court must take into consideration appraisement of the property as a guide in the exercise of its discretion in accordance with the intendment of the statute cited. *Where the bankruptcy court fails to confirm a judicial sale in the absence of unfairness, fraud or mistake or gross*

> *inadequacy of price, its action will be reversed on the ground of abuse of its legal discretion.*" (Emphasis by the Court.)

In *Sturgiss v. Corbin,* 141 F. 1 (C. C. A. 4, 1905), the court ordered two commissioners to sell certain property of the bankrupt, and accordingly it was sold at public auction for $154,000. At the hearing for confirmation of the sale, an offer of $160,000 was submitted, and at that time the court ordered a resale in its presence, at which time one Sturgiss bid a total of $200,200, and the property was sold pursuant to this bid in the presence of the Court; this latter sale was then brought before the court for confirmation, at which time another bid of $208,000 was received. The court then ordered another resale, and finally the property was bid in for $220,000, and the sale confirmed. On appeal, the Circuit Court held that the District Court abused its discretion in setting aside the sale for $200,200 to Sturgiss and said in this connection (p. 3):

> "The advance offer of $7,800 was, of itself, under the circumstances attending the purchase by Sturgiss, not sufficient to warrant the setting aside of the sale. A sale made under a judicial decree will not, when no misunderstanding existed among the bidders, and when no fraud is shown, be set aside for mere inadequacy of price, unless such inadequacy *is so gross as fairly to raise a presumption of fraud.* The practice of opening biddings and of setting aside sales made during the progress of judicial proceedings should not be encouraged, as it is not conducive to the interests of litigants, and it tends to shake public confidence in the validity and finality of judicial sales, and to unduly prolong litigation. A purchaser at a judicial sale, who has complied with the

terms thereof, or who shows his willingness and ability so to do, is not only entitled to the protection of the court, but as a party to the proceeding, made such by his purchase, is so situated as to be entitled to the court's decree of confirmation, in the absence of the inadequacy, fraud, or mistake before alluded to.

. . . .

". . . The additional offer was not of such a character as would demonstrate inadequacy of price, or justify a refusal to confirm. If a judicial sale has been fairly conducted, as was the sale we now consider, the rights of the purchaser should be protected, not only because it is his due, but also for the purpose of protecting such sales from the evil and chilling influences of instability and doubt."

Conclusion.

We think the foregoing authorities when applied to the facts in this case clearly require that the order of the District Court be reversed and the order of the Referee be reinstated and affirmed.

Respectfully submitted,

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